AZABAR HOLDINGS SDN BHD v. KUMARAPPAN KM PALANIAPPAN & ANOR

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
S NANTHA BALAN JCA
NORDIN HASSAN JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-777-04-2019]
16 DECEMBER 2020

COMPANY LAW: *Winding up – Disposition of property – Disposition of property after commencement of winding-up proceedings – Whether complied with s. 223 of Companies Act 1965 – Whether there was order of validation by winding-up court – Whether lands fraudulently transferred – Whether transfers null and void and of no effect*

The plaintiff/appellant, Azabar Holdings Sdn Bhd (in liquidation) ('Azabar'), a company involved in property development, was the registered owner of two parcels of land, Lot 7328 and Lot 7300 ('the lands'). Azabar owed taxes to the Government of Malaysia ('GOM'). The GOM filed a civil suit against Azabar and obtained judgment. The GOM then issued a statutory notice pursuant to s. 218(2)(a) of the Companies Act 1965 ('CA 1965'). Azabar did not settle the amount outstanding within 21 days as prescribed in the statutory notice or at any time thereafter. The GOM then filed a petition to wind up Azabar based on Azabar's inability to pay its debts per s. 218(1)(e) of the CA 1965. Azabar was wound up on 19 August 2002. The Official Receiver of Malaysia ('the ORM') was appointed as the provisional liquidator for Azabar. One Bala Krishnan Ponniah ('Mr Bala') was appointed as the liquidator for Azabar with the consent and/or agreement of the ORM and Azabar's creditors. Mr Bala subsequently discovered that the lands were fraudulently transferred to the first defendant/respondent ('D1') *via* powers of attorney. Mr Bala lodged police reports with respect to the fraudulent land transfer and lodged caveats over the lands pursuant to s. 323 of the National Land Code ('NLC'). Azabar alleged that D1 and the second defendant/respondent, D2, conspired to commit fraud, forgery and cheating to fraudulently transfer the lands to D1. Apart from contending that the powers of attorney for Lot 7238 and Lot 7300 ('the impugned PAs') were forged, Azabar also contended that the transfers of the lands to D1 were void as they were affected without the consent and/or knowledge of the ORM or the liquidator and was done without the leave of the winding-up court or the consent of Azabar's creditors or contributors. Azabar took the position that the transfer of the lands were void as they were contrary to s. 223 of the CA 1965 (now s. 472 of the Companies Act 2016). Azabar sought declarations that the said transfers were void and of no legal effect and prayed for

consequential orders for the titles to the lands to revert to Azabar. Azabar also sought damages, injunctive relief restraining D1 and D2 and/or their agents from disposing, or in any other way, dealing with the lands plus interests and costs. The High Court opined that the impugned PAs were central to Azabar's case and held that the PAs were not properly before the court as they were merely marked as ID documents and dismissed Azabar's claim. Hence, this appeal. The thrust of Azabar's complaint was that the High Court had failed to consider a key aspect of their case – that the purported transfer of the lands to D1 was null and void as it was done in contravention of s. 223 of the CA 1965.

Held (allowing appeal)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The High Court Judge ('HCJ') did not deal with the undisputed fact that the lands were transferred several years after Azabar was wound up and there was no validation of the transfers by the winding-up court in accordance with s. 223 of the CA 1965. The HCJ failed to appreciate that Azabar's claim was premised both on an allegation of fraud for which the impugned PAs were relevant, and a claim that the transactions were void as they had offended s. 223 of the CA 1965 for which the impugned PAs were irrelevant. On the issue of disposition of property after the commencement of winding-up proceedings, the transfer of any property belonging to a company after the commencement of winding-up proceedings against it, was void if it did not comply with s. 223 of the CA 1965. (paras 27, 31 & 33)

(2) On the basis of the court case of *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors,* the mere execution of the impugned PAs on 19 November 2001 did not amount to a disposition of Azabar's property. Rather, the relevant dates for purposes of s. 223 of the CA 1965 were the dates of registration of transfer of titles from Azabar's name to D1's name. The impugned PAs were both dated 19 November 2001 whereas the transfer of Lot 7328 took place on 28 June 2016 and Lot 7300 took place on 20 October 2016 and both these dates were well after Azabar was wound up on 19 August 2002. It was clear that the transfers of the lands on the dates mentioned above were void pursuant to s. 223 of the CA 1965. (paras 40-42)

(3) There was a misdirection on the part of the HCJ in the terms of his omission to deal with that part of the case that was presented by Azabar pertaining to the infirmity and invalidity which were inherent in the transfers by reason of their clear and indisputable contravention of s. 223 of the CA 1965, which rendered the disposition of the lands as null and void and of no effect, save where there was a validation by the

winding-up court, of which there was none in the present case. As such, the transfer of the lands from Azabar to D1 was clearly in contravention of s. 223 of the CA 1965 and as there was no order of validation by the winding-up court, these transfers were null and void and of no effect. Following the case of *AI Levy (Holdings) Ltd*, the transfers of the lands were to be regarded as if they had never taken place. (paras 44 & 46)

Case(s) referred to:
AI Levy (Holdings) Ltd [1964] 1 Ch 19 ***(foll)***
Chai Yen Chong & Ors v. Shencourt Properties Sdn Bhd & Ors [2012] 1 LNS 591 CA ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***
Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(foll)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 218(1)(e), (2)(a), 223
Companies Act 2016, s. 472
National Land Code, ss. 323, 340(4)(b)

Companies Act 1948 [UK], s. 227

For the appellant/plaintiff - Gobind Singh Deo & Thanashri K Supaya; M/s Shri & Partners
For the respondents/defendants - T Gunaseelan & Keshvinjeet Singh; M/s Gunaseelan & Assocs

[Editor's note: Appeal from High Court, Shah Alam; Suit No: BA-22NCVC-261-04-2017 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] This is an appeal against the decision of the High Court at Shah Alam dated 28 March 2019 whereby the learned judge ("the judge") dismissed the plaintiff's claim in Suit No. BA-22NCVC-261-04-2017 ("Suit 261") after a full trial.

[2] The plaintiff in Suit 261 (appellant in the present appeal) is Azabar Holdings Sdn Bhd (in liquidation) ("Azabar"). The defendants in Suit 261 (respondents in the present appeal) are Kumarappan @ Thannirmalai a/l KM Palaniappan ("D1") and Devi a/p Raman @ Raman Kutty ("D2"). For convenience, we shall refer to the parties as Azabar, D1 and D2 respectively. D1 and D2 shall be referred to collectively as "the defendants".

[3] On 16 December 2020, we allowed Azabar's appeal and granted the reliefs sought in the writ and statement of claim dated 26 April 2017. We also ordered costs of RM20,000 against the defendants. This judgment explains why we allowed Azabar's appeal.

A **The Facts**

[4] Azabar is a private limited company. They are involved in property development. Azabar was the registered owner of two parcels of land held under HSM 7328, PT No. 19744, Mukim Sungai Buloh, District of Petaling, Negeri Selangor ("Lot 7328") and HSM 7300, PT No. 19716, Mukim
B Sungai Buloh, District of Petaling, Negeri Selangor ("Lot 7300"). We shall refer to Lot 7328 and Lot 7300 collectively as "the lands".

[5] Azabar owed taxes to the Government of Malaysia ("the GOM"). The GOM filed a civil suit against Azabar and obtained judgment on 8 June 1998. The GOM then issued the statutory notice dated 12 October 1999 pursuant
C to s. 218(2)(a) of the Companies Act 1965 ("CA 1965"). The amount outstanding under the judgment as at 8 October 1999 was RM5,176,611.91. Azabar did not settle the amount outstanding within 21 days as prescribed in the statutory notice, or at any time thereafter.

D **[6]** The GOM then filed Shah Alam High Court Winding-up Petition No.: MT4-28-201-2000 ("Petition 201") to wind up Azabar. Petition 201 was based on Azabar's inability to pay its debts per s. 218(1)(e) of the CA 1965. Azabar was wound up on 19 August 2002. The Official Receiver of Malaysia ("the ORM") was appointed as the provisional liquidator for Azabar.

E **[7]** On 25 March 2013 one Kartar Singh a/l Gurchan Singh ("Kartar Singh") was appointed as the liquidator for Azabar. Kartar Singh was replaced by Mr Bala Krishnan a/l Ponniah ("Mr Bala") from Messrs Moore Stephens Associates & Co who was appointed as the liquidator for Azabar on 19 February 2014.

F **[8]** Mr Bala's appointment was done with the consent and/or agreement of the ORM and Azabar''s creditors. Mr Bala discovered that the lands were fraudulently transferred to D1. D1 is a Malaysian citizen and was the donee of the powers of attorney. Essentially, the powers of attorney gave D1 the power to deal with and/or to transfer the lands to himself.

G **[9]** Specifically, Mr Bala found that the lands had been transferred to D1 *via* powers of attorney which had been purportedly signed by the late lzzudin bin Osman ("lzzudin") (a director of Azabar) and Mr Lau Fook Meng ("Mr Lau"), the former General Manager and Company Secretary of Azabar. lzzudin died on 18 July 2010.

H **[10]** D2 is an advocate and solicitor of the High Court of Malaya and practised under the name and style of Messrs Devi Raman & Associates. D2's name and signature appear on the powers of attorney as the advocate and solicitor who purportedly witnessed the affixation of Azabar's common seal on the documents.

I

[11] Mr Bala lodged police reports on 17 April 2016 and 22 December 2016 with respect to the fraudulent land transfer. He also lodged caveats over the lands pursuant to s. 323 of the National Land Code ("NLC").

[12] Mr Lau also lodged a police report dated 21 April 2017 stating, *inter alia*, that he did not execute the powers of attorney and that he did not know and had never met D1 or D2.

[13] Mr Lau also stated that there were no land transactions whereby Azabar had sold or transferred the lands to D1. The relevant part of Mr Lau's police report reads as follows:

> … saya juga mengesahkan bahawa saya tidak pernah brjumpa atau melawati pejabat peguam yang bernama Devi Raman.
>
> Saya juga tidak mengenali sesiapa yang bernama Kumarappan @ Thannirmalai a/l K.M Palaniappan (No. K/p: 681109-10-6391).
>
> Saya juga mengesahkan bahawa saya atau syarikat tersebut tidak pernah memasuki, menandatangani, menyempurnakan atau melaksanakan sebarang perjanjian jual beli, peminda-milikan, penyerahan hak, surat kuasa wakil seperti yang disebut di atas, mencagar atau memajak hartanah-haratanah (*sic*) tersebut kepada mana-mana pihak ketiga dan juga telah Kumarappan @ Thannirmalai a/l K.M Palaniappan (No. K/p: 681109-10-6391).
>
> Ini adalah satu penipuan dan perbuatan fraud yang berlaku dalam pemindah-milik hartanah-hartanah tersebut kepada syarikat tersebut.
>
> Tujuan saya buat laporan ini untuk melindungi kepentingan saya dan menafikan surat kuasa wakil tersebut. Sekian laporan saya.

[14] Azabar alleged that D1 and D2 conspired to commit fraud, forgery and cheating to fraudulently transfer the lands to D1. The transfers were made through two powers of attorney both dated 19 November 2001. Mr Lau testified at the trial and disavowed his signatures which appeared in the powers of attorney.

[15] The power of attorney for Lot 7328 although dated 19 November 2001, was stamped on 29 May 2013 and deposited at the Shah Alam High Court on 30 May 2013 and registered as PA 3454/2013. The transfer form (Form 14A) for Lot 7328 was presented at the land office on 28 June 2016 and registered as Presentation No. 2172/2016. Lot 7328 was transferred to D1 on 28 June 2016.

[16] The power of attorney for Lot 7300 although dated 19 November 2001, was stamped on 18 October 2014 and was deposited at the Shah Alam High Court on 17 October 2014 and registered as PA 6234/2014. It is of course perplexing that the stamping of the document ante-dates the date when it was deposited with the High Court at Shah Alam. The transfer form (Form

14A) for Lot 7300 was presented at the land office on 20 October 2016 and registered as Presentation No. 3448/2016. Lot 7300 was transferred to D1 on 20 October 2016.

[17] The powers of attorney for Lot 7328 and Lot 7300 shall be referred to collectively as "the impugned PAs"

[18] Apart from contending that the impugned PAs were forged, Azabar also contends that the transfers of the lands to D1 are void as they were affected without the consent and/or knowledge of the ORM or the liquidator and was done without the leave of the winding-up court or the consent of Azabar's creditors or contributors. Azabar takes the position that the transfer of the lands are void as they were contrary to s. 223 of the CA 1965 (now s. 472 of the Companies Act 2016 ("CA 2016").

The Statement Of Claim

[19] Azabar's pleaded case per the statement of claim ("the SOC") is as follows:

> 6. Pada semua masa yang material Plaintif adalah pemilik berdaftar dan tuanpunya dua (2) bidang tanah yang dipegang di bawah HSM 7328, PT No. 19744, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor ("HSM 7328") (seluas 149 Meter Persegi), dan HSM 7300, PT No. 19716, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor ("HSM 7300") (seluas 149 Meter Persegi) ("Tanah-tanah tersebut").
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> 7. Tanah-tanah tersebut pada semua masa yang material adalah aset-aset milikan Plaintif bagi tujuan seksyen-seksyen 233 dan 236 Akta Syarikat, 1965 dan/atau seksyen-seksyen 482 dan 486 Akta Syariat (*sic*), 2016.
>
> 8. Tanah-tanah tersebut tidak dicagarkan kepada mana-mana pihak oleh Plaintif.
>
> 9. Pada semua masa yang matan (*sic*) semenjak penggulungan Plaintif pada 19.8.2002, Pegawai Penerima Malaysia dan/atau Pelikuidator Plaintif tidak pernah (*sic*) melantik mana-mana pihak ketiga sama ada syarikat, perniagaan dan/atau peguamcara atau individu sebagai wakil atau ejen Plaintif bagi tujuan menjual Tanah-tanah tersebut kepada mana-mana pihak yang lain termasuk Defendan-Defendan.
>
> 10. Pelikuidator Plaintif boleh mengesahkan melalui rekod-rekod dan dokumen-dokumen Plaintif yang berada dengan Jabatan lnsolvensi Malaysia.
>
> 11. Pada semua masa yang material Pegawai Penerima Malaysia dan/atau Pelikuidator Plaintif tidak pernah memasuki, menandatangani, menyempurnakan atau melaksanakan sebarang perjanjian atau persetujuan untuk menjual, memindah milik, memberi Suratkuasa Wakil, menyerah-hak, menyandar, memajak, mencagar atau menggadaikan Tanah-tanah tersebut kepada mana-mana pihak yang lain termasuk Defendan Pertama.

12. Pada atau sekitar 21.11.2016, Plaintif dimaklumkan oleh peguamcara Plaintif bahawa mereka menerima maklumat daripada carian rasmi atas Tanah-tanah tersebut dari Pejabat Pentadbir Tanah Daerah Petaling, Selangor untuk membuat permohonan memperbaharui Hakmilik yang hilang ke atas Tanah-tanah tersebut bahawa Tanah-tanah tersebut telah pun dipindah-milik daripada Plaintif kepada Defendan Pertama secara frod dan menyalahi undang-undang.

13. Setelah peguamcara Plaintif melakukan carian-carian ke atas Tanah-tanah tersebut di Pejabat Pentadbir Tanah Daerah Petaling, Selangor, Plaintif mendapati bahawa Tanah-tanah tersebut telah pun dipindah-milik daripada Plaintif kepada Defendan Pertama secara frod, penipuan, pemalsuan dan menyalahi undang-undang pada 28.06.2016 melalui No. Perserahan: 2172/2016 dan pada 20.10.2016 melalui No. Perserahan: 3448/2016.

14. Pindah-milik Tanah-tanah tersebut dibuat tanpa persetujuan dan pengetahuan Pegawai Penerima Malaysia atau Pelikuidator Plaintif dan juga tanpa kebenaran Mahkamah Tinggi Malaya di Shah Alam selaras dengan seksyen 236(3) Akta Syarikat, 1965 dan/atau seksyen 486(2) Akta Syarikat, 2016 dan tanpa persetujuan pemiutang-pemiutang dan penyumbang-penyumbang Plaintif di bawah seksyen 237(1) Akta Syarikat, 1965 dan/atau seksyen 487 Akta Syarikat, 2016.

15. Maka, pindah-milik Tanah-tanah tersebut adalah tidak sah dan terbatal dibawah seksyen 233 dan 236 Akta Syarikat, 1965 dan/atau seksyen 483 dan 486 Akta Syarikat, 2016.

...

23. Pindah-milikan Tanah-tanah tersebut oleh Defendan Pertama telah pun dilakukan dalam tempoh masa kurang daripada 18 tahun selepas Penghakiman bertarikh 8 haribulan Jun 1998 tersebut; 17 tahun selepas Notis di bawah seksyen 218(2)(a) Akta Syarikat, 1965 dikeluarkan oleh Kerajaan Malaysia pada 12 haribulan Oktober 1999 dan 16 tahun selepas Petisyen Penggulungan Syarikat Plaintif tersebut difailkan oleh Kerajaan Malaysia pada 28 haribulan Ogas 2001 dan 14 tahun selepas Perintah Penggulungan Syarikat Plaintif dibuat oleh Mahkamah Tinggi Shah Alam.

24. Pelikuidator tersebut mengambil pendirian bahawa pindah-milik Tanah-tanah tersebut kepada Defendan Pertama pada 28.06.2016 dan 20.10.2016 **adalah tidak sah dan terbatal menurut seksyen-seksyen 223** dan 293(1) dan (2) **Akta Syarikat, 1965** dibaca bersama dengan seksyen 53(1) Akta Kebankrapan, 1967 dan/atau seksyen-seksyen **472(1)** dan 528 **Akta Syarikat, 2016.**

(emphasis added)

[20] Azabar sought declarations that the said transfers were void and of no legal effect and prayed for consequential orders for the titles to the lands to revert to Azabar. Azabar also sought damages, injunctive relief restraining D1 and D2 and/or their agents from disposing, or in any other way dealing with the lands plus interests and costs.

The High Court

[21] Azabar called five witnesses in support of its case. The copies of the impugned PAs were produced through Mr Bala. They were Part C documents. The authenticity and contents of the impugned PAs were disputed. These documents were therefore marked as "ID" documents, as Azabar anticipated that D2, who allegedly witnessed the PAs, would be testifying. Azabar's trial strategy was to convert them from IDs to exhibits when D2 gave evidence.

[22] In this regard, a witness statement had in fact been filed on behalf of D2. But D2 elected not to testify. D1 also filed a witness statement but he did not testify. At the close of the case for Azabar, the defendants elected not to call any witnesses. Counsel for D1 and D2 made a submission of no case to answer.

[23] Counsel for the defendants submitted that Azabar had failed to make out a case of fraud and forgery against the defendants as the impugned PAs had only been marked as ID documents and were not properly tendered before the court. The judge agreed with the position that was taken by the defendants. The judge opined that the impugned PAs were central to that part of Azabar's case. He agreed with the submission of the defendants that the PAs were not properly tendered before the court as they were merely marked as ID documents. The judge therefore dismissed Azabar's claim in its entirety.

[24] We turn now to the judge's grounds of judgment ("GOJ"). The relevant paragraphs of the GOJ are as follows:

> [21] In this case, from the Statement of Claim it is clear that the Plaintiff solely relied on the two purported Powers of Attorney to alleged fraud, forgery and/or cheating against the Defendants. It is also the Plaintiff's allegation that the two Powers of Attorney that were used to transfer the said two Parcels of Lands were instruments of fraud. Therefore, it is for the Plaintiff, having made the assertion that the purported 2 Powers of Attorney are instrument of fraud, bears the burden of proving, on balance of probability, that in fact the purported Powers of Attorney are instruments of fraud and were used for the transfer of the said two Parcels of Land to 1st Defendant. Hence, it is my considered view that, the said two Powers of Attorney must be before the Court before the court could make any determination as to the authenticity or validity of the said Powers of Attorney. In other words, the Plaintiff must adduce the said Power of Attorney into evidence and then prove that the same are fraud, forgery or cheating on balance of probability.

[22] Unfortunately, the two Powers of Attorney, which were "Part C Documents", were not adduced into evidence by the Plaintiff and were merely marked as "Identification Document" (ID). Both Powers of Attorney were only identification documents in the non-agreed bundle and were never converted to court exhibits. Documents marked as ID are not exhibits and cannot be relied upon.

[23] Without the two purported Power of Attorney, which Plaintiff alleged to be instruments of fraud before the court, the learned counsel for the Defendants submitted that the entire basis and substratum of the Plaintiff's case does not exist and Plaintiff failed to adduce any evidence to prove the alleged fraud, forgery and/or cheating between the 1st and 2nd Defendants and failed to prove the two Powers of Attorney were in fact instrument of cheating.

[28] Going through the evidence by all the Plaintiff's witnesses, I find the Plaintiff failed to prove that the Plaintiff had not prepared and signed both Powers of Attorney. When the Plaintiff failed to prove (produced as exhibits) the two Powers of Attorney, it follows that there is no proof who signed or prepared the two purported Powers of Attorney.

[29] Regarding the oral testimony of SP1 and SP2 who testified that the two purported Powers of Attorney was not prepared and signed by the Plaintiff, it is trite law that oral evidence of a witness in respect of the content of a document which is not in evidence, is hearsay. Without the two Powers of Attorney before the court, I find those evidence by SP1 and SP2 are hearsay evidence insofar as both the Powers of Attorney are concern and no reliance could be placed on their evidence.

[30] This includes the testimony of SP2 who went on to give evidence that based on his 10 years' experience witnessing Encik lzzudin's signature, he opined what is claimed to be the former director's Encik lzzudin bin Osman's signature, which appears on the said purported Power of Attorneys is not Encik Izzudin bin Osman's signature. In my considered view, these are hearsay evidence and do not prove that the two purported Powers of Attorney are instruments of fraud. Granted that under section 47 of Evidence Act 1950 a witness familiar with signature of a person may give his opinion on the signature in question, in my view, the document on which the Signature appear must first be put in evidence before the court. Simply put, a witness cannot give his opinion in respect of a signature on a document which is not before the court.

...

A [32] Coming back to this case, it is pertinent to note that the 1st Defendant is the registered owner of the said two Parcels of Land. By virtue of section 340 of the National Land Code the 1st Defendant's title is indefeasible unless the Plaintiff can establish fraud or the registration was obtained by forgery or by means of an insufficient or void instrument. In this regard, the Plaintiff's I own
B witnesses, SP-3 (Land Office Officer) and SP-4, (Also Land Office Officer), testified that the registration concerned were valid, Further, under section 114(e) of the Evidence Act 1950, the court may presume that judicial and official acts have been regularly performed. This requires the Plaintiff to rebut this presumption, in addition to the fact that the Plaintiff's own witnesses testified that
C the registration was regular.

[33] Therefore, with respect, I agree with the Defendant's learned counsel that the Plaintiff's contention that it is for the 1st Defendant to prove the handwriting on the 2 Powers of Attorney are genuine, ran contrary to established principle of law. It is the
D Plaintiff who alleges the signature is a forgery. Consequently it is for the Plaintiff to produce both the purported Power of Attorney and to prove that the signatures are forgery. As correctly observed by the learned counsel for the Defendant; if the Plaintiff's argument is accepted it would mean that every time or anytime any person, even without basis, were to allege that the transfer of a property was
E effected by forged document, the registered owner must prove that the documents were validly executed even after 25 or 30 years. This would make a mockery of Section 101 of the Evidence Act 1950 and also Section 340 National Land Code 1965.

Conclusion

F [34] Looking at the evidence tendered by the Plaintiff, even if they are deemed to be true by virtue of the fact that the Defendants had elected to submit no case to answer, the Plaintiff has failed to establish the cause of action as pleaded against both Defendants. Hence, Plaintiff's claim against both Defendants are dismissed with
G RM15,000.00 to each Defendant subject to allocator fee.

Our Decision

[25] The thrust of the Azabar's complaint before us per the memorandum of appeal ("MOA"), is that the judge failed to consider a key aspect of their case – that the purported transfer of the lands to D1 was null and void as it
H was done in contravention of s. 223 of the CA 1965. Azabar's complaint in this regard was as follows:

11. Yang Arif Hakim Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal mengambil kira keterangan SP14 serta hujahan Plaintif mengenai kedudukan
I Plaintif sebagai sebuah syarikat yang telah **digulungkan pada 19.08.2002** dan yang telah menerima sesalinan Petisyen

Penggulungan bertarikh 28.06.2000 pada 08.05.2001 yang menjadikan segala transaksi pendaftaran hartanah-hartanah milik Plaintif tidak sah disisi undang-undang selaras dengan **Seksyen 223 Akta Syarikat 1965;**

12. Yang Arif Hakim Mahkamah Tinggi yang bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal membuat inferens berdasarkan segala keterangan Plaintif berkenaan dengan penggulungan syarikat serta pertikaian Plaintif terhadap pendaftaran hartanah-hartanah selaras dengan peruntukkan dibawah Kanun Tanah Negara, 1965 dan Akta Syarikat 1965 dan/atau Akta Syarikat 2016 (Akta substantif); (emphasis added)

[26] We have examined the judge's GOJ very carefully. It deals primarily with the issue of the impugned PAs and the fact that they were just marked as ID documents and were not marked as exhibits. On that premise the judge concluded that there was no evidence to support the allegation of fraud/forgery, etc.

[27] But it is quite apparent that the judge did not deal with the undisputed fact that the lands were transferred several years after Azabar was wound up and there was no validation of the transfers by the winding-up court in accordance with s. 223 of the CA 1965. It was argued for D1 and D2 that the impugned PAs are dated 19 November 2001 and therefore pre-dates the winding-up order which was made on 19 August 2002. It was therefore contended that the transfers of the lands into D1's name, are not affected by the winding-up order.

[28] Section 223 of the CA 1965 reads as follows:

223 Avoidance of dispositions of property, etc.

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company **made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.**

(emphasis added)

[29] For completeness, we should mention that under the CA 2016, the former s. 223 of the CA 1965 has been recast as s. 472 of the CA 2016 which reads as follows:

(1) **Any disposition of the property of the company,** other than an exempt disposition, including any transfer of shares or alteration in the status of the members of the company **made after the presentation of the winding up petition shall, unless the Court otherwise orders, be void.**

A (2) In subsection (1), "exempt disposition" means a disposition made by a liquidator, or by an interim liquidator of the company in exercise of the power conferred on him under Part I of Twelfth Schedule or the rules that appointed him or an order of the Court.

(3) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the presentation of the winding up petition shall be void. (emphasis added)

B

[30] Thus, the jurisprudence established by case laws under s. 223 of the CA 1965 applies to s. 472 of the CA 2016.

C **[31]** In so far as the present appeal is concerned, it is clear that the judge failed to appreciate that Azabar's claim was premised both on an allegation of fraud for which the impugned PAs were relevant, and a claim that the transactions were void as they had offended s. 223 of the CA 1965, for which the impugned PAs are irrelevant.

D **[32]** It is clear from the SOC that the contravention of s. 223 of the CA 1965 was expressly pleaded and was a point which was expressly taken up in the submissions before the judge. However, there is nothing in the GOJ which indicates that the judge had considered and/or made a finding on this issue.

E **[33]** On the issue of disposition of property after the commencement of winding-up proceedings, it is settled law that the transfer of any property belonging to a company after the commencement of winding up proceedings against it, is void if it does not comply with s. 223 of the CA 1965.

[34] The starting point is the seminal case of *Lian Keow Sdn Bhd (In* F *Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1987] 1 MLRA 672; [1988] 2 MLJ 449 (SC) ("*Lian Keow*'s case").

[35] In that case, the Supreme Court held that a transfer of land which was registered after the commencement of winding up was void, even though the actual transfer documents had been executed prior to the commencement of G winding up. In dealing with s. 223 of the CA 1965, Justice Seah SCJ in *Lian Keow*'s case referred to s. 227 of the English Companies Act 1948, which is in *pari materia* to s. 223 of the CA 1965 and Seah SCJ said:

> Before considering these rival submissions, I like to state that the corresponding section in the English Companies Act 1948 is section 227. H In *Re Wiltshire Iron Company* (1868) 3 Ch App 443, Lord Cairns LJ, speaking of the general purpose of section 153 (the forerunner of section 227) of the English Companies Act 1862, said at p. 446:
>
> > The 153rd section no doubt provides that *all dispositions of the property and effects of the company made between the commencement of the* I *winding up (that is the presentation of the petition) and the order for winding*

up shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis.

(emphasis added)

[36] In *Chai Yen Chong & Ors v. Shencourt Properties Sdn Bhd & Ors* [2012] 1 LNS 591; [2013] 1 MLRA 468 (CA), parcels of land belonging to the company were transferred after winding-up proceedings were commenced against the company. The Court of Appeal agreed with the High Court's decision that the transfer was void as being in contravention of s. 223 of the CA 1965. The Court of Appeal held:

[11] We further agree with the findings that the transfer of the 17 pieces of land by Shencourt which was registered on 2 May 2002 to LPSB constitutes a disposition of the property of Shencourt within the meaning of s. 223 of the CA. The said provision declares such disposition to be void. Further, there has been no evidence proffered to show that the proviso "unless the court otherwise orders" applies.

[12] Section 223 of the CA provides:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void.

[13] The commencement of the winding up of Shencourt was on 15 January 2002, i.e. when the winding up petition was presented and the order of winding up by the Kuala Lumpur High Court was made on 19 April 2002. On the factual matrix of the case, the transfer by Shencourt of the 17 pieces of properties is caught by the said provision.

[37] As for the effect and consequences of a contravention of s. 223 of the CA 1965, we think that it is highly relevant to refer to *AI Levy (Holdings) Ltd* [1964] 1 Ch 19 where Buckley J (an obvious authority in company law jurisprudence) examined the equivalent section under English company law and said:

It appears to me that the object of the section is to protect the interests of the creditors from the possibly unfortunate results which would ensue from the presentation of a petition, and to protect their interests as much during the period while the petition was pending as after an order has been made on it. What the section provides in its present terms is that any disposition of the property of the company made after the commencement of the winding up shall be void in the winding up of the company unless the court otherwise orders; that is to say, **if and when the company comes to be put into liquidation the transaction is to be as if it had never taken place.** (emphasis added)

[38] We had mentioned earlier that the defendants took the position that s. 223 of the CA 1965 is inapplicable. They said that the impugned PAs were made well before the winding-up order. However, the transfer of the lands took place years after the winding-up order.

[39] In this regard, it is to be noted that the Supreme Court in *Lian Keow*'s case proceeded on the footing that the relevant date for purposes of s. 223 of the CA 1965 is the date of registration of transfer of the land and not the earlier date of execution of the contractual documents. The passage from *Lian Keow*'s case reads as follows:

> For the first respondent, learned counsel now concedes that these three dispositions were made at the time of registration at the Land Registry office and since all three of them were registered after the presentation of the winding up petition by the court on 13 November 1978 they were therefore void under section 223 of the Companies Act 1965.

[40] Hence, on the basis of *Lian Keow*'s case, it is our view that the mere execution of the impugned PAs on 19 November 2001 does not amount to a disposition of Azabar's property. Rather, the relevant dates for purposes of s. 223 of the CA 1965 are the dates of registration of transfer of titles from Azabar's name to D1's name.

[41] Based on the principles enunciated in the cases referred to above, it is abundantly clear in the present case before us that the impugned PAs were both dated 19 November 2001 whereas the transfer of Lot 7328 took place on 28 June 2016 and for Lot 7300 it took place on 20 October 2016 and both these dates are well after Azabar was wound up on 19 August 2002.

[42] As a result, it is clear that the transfers of the lands on the dates mentioned above are void pursuant to s. 223 of the CA 1965. Consequently, the title was registered in D1's name stands impugned per s. 340(4)(b) of the NLC which reads:

> Nothing in this section shall prejudice or prevent:
>
> (a) ...
>
> (b) the **determination of any title** or interest **by operation of law.**
>
> (emphasis added)

[43] It is apposite in our view to refer to the seminal discussion by Gopal Sri Ram JCA (as he then was) in *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636 (FC) where the learned judge (speaking for the Federal Court) dealt with s. 340(4)(b) of the NLC and said:

> In our judgment, Parliament enacted s. 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second sub-section to s. 340 of the Code. While recognising that it is neither possible, nor desirable

to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second sub-section, may yet come within the scope of s. 340(4)(b), we cite, by way of illustration only, cases decided under the Moneylenders Act 1951.

[44] In light of the several matters referred to above, there was in our view, a misdirection on the part of the judge in the terms of his omission to deal with that part of the case that was presented by Azabar pertaining to the infirmity and invalidity which were inherent in the transfers by reason of their clear and indisputable contravention of s. 223 of the CA 1965, which renders the disposition of the lands as null and void and of no effect, save where there is a validation by the winding-up court, of which there is none in the present case.

[45] Indeed, D1 contends that s. 223 of the CA 1965 does not bite and made no effort to obtain an order from the winding-up court to validate the transfer of the lands to his name.

[46] As such, the transfer of the lands from Azabar to D1 is clearly in contravention of s. 223 of the CA 1965 and as there is no order of validation by the winding-up court, these transfers are null and void and of no effect. Following *AI Levy*'s case (*supra*) the transfers of the lands are to be regarded as if they had never taken place.

Outcome

[47] In the circumstances and for the reasons discussed above, Azabar's appeal is allowed with costs of RM20,000, as costs here and below.

[48] We also granted the following consequential reliefs:

(a) Perintah Pengisytiharan ("Declaration") bahawa pindah milik HSM 7328, PT No. 19744, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor ("HSM 7328") (seluas 149 Meter Persegi) daripada Plaintif kepada Defendan Pertama yang didaftarkan oleh Pentadbir Tanah Daerah Petaling, Negeri Selangor pada 28.6.2016 melalui No. Perserahan 2172/2016 adalah tidak sah dan terbatal.

(b) Perintah Pengisytiharan ("Declaration") bahawa pindah milik HSM 7300, PT No. 19716, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor ("HSM 7300") (seluas 149 Meter Persegi) daripada Plantif kepada Defendan Pertama yang didaftarkan oleh Pentadbir Tanah Daerah Petaling, Negeri Selangor pada 20.10.2016 melalui No. Perserahan 23448/2016 adalah tidak sah dan terbatal.

(c) Perintah mengarahkan Pentadbir Tanah Daerah Petaling, Negeri Selangor untuk membatalkan pindah-milik HSM 7328 dan HSM 7300 yang dirujuk dalam perenggan (a) dan (b) di atas daripada Plaintif kepada Defendan Pertama dalam tempoh masa 14 hari dari tarikh perintah atau penghakiman di sini.

A

(d) Perintah untuk mengarahkan Pentadbir Tanah Daerah Petaling, Negeri Selangor untuk mendaftarkan semula HSM 7328 dan HSM 7300 yang dirujuk dalam perenggan-perenggan (a) dan (b) di atas nama Plaintif dalam Buku Daftar Hakmilik Tanah di Pejabat Daerah Tanah Petaling dan/atau Pentadbir Tanah Daerah Petaling, Negeri Selangor dalam tempoh 14 hari dari tarikh Perintah atau Penghakiman disini.

B

(e) Perintah untuk mengarahkan Pentadbir Tanah Daerah Petaling, Negeri Selangor untuk mengeluarkan Surat-surat Hakmilik Tanah atau Geran Tanah yang baru untuk HSM 7328 dan HSM 7300 yang dirujuk di dalam perenggan-perenggan (a) dan (b) di atas, atas nama Plaintif dalam dalam (*sic*) tempoh 14 hari dari tarikh Perintah atau Penghakiman disini, dan

C

(f) Perinlah mengarahkan Pentadbir Tanah Daerah Petaling, Negeri Selangor untuk membatalkan atau menarik balik mana-mana Kaveat Pendaftar yang didaftar atas HSM 7328 dan HSM 7300 yang dirujuk dalam perenggan (a) dan (b) di atas dengan serta-merta untuk membolehkan pelaksanaan Perintah-perintah di perenggan (a), (b), (c), (d), dan (e) diatas.

D

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